IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-850

AERO TRUCKING, INC., *Petitioner*

v.

C & H TRANSPORTATION CO., INC.,
DAILY EXPRESS, INC. and
DALLAS & MAVIS FORWARDING CO., INC.,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. CHESNUTT
JASON S. SHAPIRO
McNEES, WALLACE & NURICK
Attorneys for Respondents

1776 F Street, N.W.
Washington, DC 20006
(202-293-1516)

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OPINIONS BELOW

JURISDICTION

STATUTES INVOLVED

STATEMENT OF THE CASE

Respondents are satisfied with Petitioner's presentation under these four headings.

QUESTION PRESENTED

Whether The Court Of Appeals Made A Fair Assessment Of The Record In Carrying Out Its Congressional Mandate of Determining Whether Findings By The Interstate Commerce Commission In A Specific

Adjudication Were Supported By Substantial Evidence.

REASONS FOR DENYING THE WRIT

Petitioner, the intervening respondent below, challenges the scope of review utilized by the United States Court of Appeals for the District of Columbia Circuit in Case No. 77-1389 in which that court partially vacated and remanded an order of the Interstate Commerce Commission (ICC) granting petitioner's Gateway Elimination Application at ICC Docket No. MC-60014, Sub 38. Neither the ICC nor the United States of America, statutory respondents below, has deemed it appropriate or necessary to join in the present petition or submit one of their own requesting a writ of certiorari.

It is a long-standing rule that orders of the ICC which are contrary to and without adequate support in the evidence are void and may be set aside by the courts. *Long Transport Corp.* v. *United States,* 75 F.Supp. 915, 924-925 (S.D. Colo. 1948) citing *Central Motor Carriers Assn.* v. *United States,* 321 U.S. 194 (1944). It has also been held that a certificate of public convenience and necessity cannot stand unless it is based on findings of fact which are supported by substantial evidence. *Norfolk and Western Ry. Co.* v. *United States,* 241 F.Supp. 974, 982 (N.D. Ohio 1965). *See also Wheatly* v. *Adler,* 407 F.2d 307, 310 (D.C. Cir. 1968) (an administrative order must be set aside if it rests on factual premises not based on substantial, record evidence).

In the present case, the court of appeals was unequivocal in its determination that much of the authority granted to petitioner in its Sub 38 application was unsupported by substantial evidence. In fact, a significant portion of the grant of authority was found to be unsupported by any evidence. *See* Opinion of Court Below, Petitioner's Appendix A at 8a. The Supreme Court has made its views known on a number of occasions with respect to questions of substantial evidence decided by courts of appeal.

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the courts of appeal. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).

In *Mobil Oil Corp.* v. *FPC,* 417 U.S. 28 (1974) this Court reaffirmed the power of the courts of appeal to determine with finality whether an agency decision was supported by substantial evidence.

> [*Permian Basin Area Rate Cases,* 390 U.S. 747 (1968)], teaches that application of the three criteria of judicial review of Commission orders [substantial evidence, excess authority, and whether an agency order considers and protects both public and private interests] is primarily the task of the court of appeals. For this [Supreme] Court's authority is essentially narrow and circumscribed. The responsibility to assess the record to determine whether agency findings are supported by substantial evidence is not ours. 417 U.S. at 309.

Furthermore, when considering a petition for certiorari from a court of appeals decision concerning whether an agency action was supported by substantial evidence, the Supreme Court need only decide

whether the lower court has made a fair assessment of the record on the issue of substantiality. *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951). The assessment made by the Court of Appeals for the District of Columbia Circuit in the present case was not only eminently fair, but involved comprehensive consideration of all aspects of the record. Petitioner's attacks upon the scope of review utilized by the court of appeals completely ignore the function of that court as defined by Congress.

Judge Bazelon has expressed the view that "the limited scope of review under the Administrative Procedure Act does not exclude review of underlying facts and assumptions upon which the agency acted." *National Cable T.V. Assoc.* v. *FCC*, 479 F.2d 183, 192 n.27 (D.C. Cir. 1973). In order to make a well-reasoned decision in the present case, the court of appeals was virtually required to examine the full panoply of facts underlying the ICC's decision, and when a number of these facts were found to be nonexistent, the court had no choice but to vacate that portion of the agency order unsupported by facts of record. *See* Opinion of Court Below, Petitioner's Appendix A at 21a.

> Where as here a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. *Transcontinental Gas P.L. Corp.* v. *FPC*, 488 F.2d 1325, 1329 (D.C. Cir. 1973).

It is axiomatic that prior to deciding any questions concerning public convenience and necessity, the court must be able to review the evidence upon which such questions were originally decided by the Commission.

In the present case the court of appeals made a thorough and detailed analysis of the entire record and determined that a large portion of the authority granted by the ICC was unsupported by the existence of *any* traffic between origin and destination points within those areas. The court of appeals did not vacate the entire decision of the ICC. It affirmed that portion of the grant of authority that was supported by substantial evidence, and merely vacated that portion of the grant which was unsupported by any traffic evidence. One of the critical findings made by the court of appeals was that the Commission's grant of authority to the petitioner involved an award of more than 600 new authorities but approximately 200 of these were never mentioned in any evidence or testimony at the hearing. *See* Opinion of Court Below, Petitioner's Appendix A at 17a. In analyzing the record of this case, the court of appeals was strongly guided by existing ICC procedures with respect to the substantiality of traffic data presented by an applicant in a gateway elimination proceeding. In *Groendyke Transport, Inc. Extension—Gateway Elimination*, 126 M.C.C. 571 (1977), Chairman O'Neal, speaking for the entire Commission stated:

> A threshold question in any gateway elimination proceeding, then, is whether the applicant has transported a substantial amount of traffic through the pertinent gateway. To grant authority from and to points to which an applicant has not actually transported traffic would result in a grant of authority neither contemplated by the gateway rules, nor required by the public convenience and necessity. *Id.* at 574; *accord, Incorporated Carriers Ltd.—Gateway Elimination*, 128 M.C.C. 810, 814 (1978).

After reviewing a traffic study furnished by petitioner, the court of appeals observed that "there is no evi-

dence that *any* of the shipments abstracted in the first study were interchanged at York, Pa., the only gateway relevant in these proceedings." Opinion of Court Below, Petitioner's Appendix A at 14a.

In upholding a reviewing court's determination that a decision issued by the ICC was not supported by substantial evidence, this Court has expressed the view that there are definite limits to judicial reliance upon administrative expertise.

> If we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is. The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. *B & O R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87, 91-92 (1968).

The analogy to the present situation is readily apparent. Petitioner wishes to resurrect an ICC decision which essentially holds that petitioner's evidence of sporadic traffic is sufficient to justify an immense award of operating authority in a gateway elimination proceeding. It must be emphasized that with respect to the vacated portion of the agency decision that the court below was not faced with evidence of sparse or irregular service between selected points in a few states, rather it was presented with a situation in which literally no traffic had been transported between a significant number of the states involved in this application. *See* Opinion of Court Below, Petitioner's Appendix A at 15a, 17a.

Reducing petitioner's argument to its most basic form, one finds that petitioner is asking this Court to review a voluminous record and engage in a lengthy factual review and analysis, the latter activity being one not generally engaged in by this Court, "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). The issues raised by petitioner involve the day-to-day details of agency adjudication, review of which has been delegated to and thoroughly performed by the Court of Appeals for the District of Columbia Circuit.

More importantly, this case involves no great issues of national scope or interest, for despite the immediate interest of the parties in the outcome of this matter, neither the ICC nor the court of appeals will be required to modify any existing procedures or regulations, regardless of the decision by the Court since no such procedures or regulations are at issue. The results in this case are the product of a unique set of factual circumstances which do not warrant any further review.

CONCLUSION

The granting of a writ of certiorari is an action which is committed to the unbridled discretion of the Supreme Court. Indeed, the issuance of such writs has been described as "matters of grace." *Wade* v. *Mayo*, 334 U.S. 672 (1948). The present matter however calls for such discretion to be exercised against the issuance of the writ because the Court of Appeals for the District of Columbia Circuit has properly performed its review-

ing function. For the aforesaid reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM A. CHESNUTT
JASON S. SHAPIRO
1776 F Street, N.W.
Washington, DC 20006

Attorneys for Respondents

Of Counsel:

McNEES, WALLACE & NURICK
Harrisburg, PA and
Washington, D.C.

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COUNSEL OF RECORD

Carl E. Howe, Jr., Attorney
Room 5111
Interstate Commerce Commission
Washington, DC 20423

James F. Ponsoldt, Attorney
Room 3418
Department of Justice
Washington, DC 20530

A. Charles Tell, Attorney
100 East Broad Street
Columbus, OH 43215

J. Michael Alexander, Attorney
136 Wynnewood Professional Building
Dallas, TX 75224

Robert J. Birnbaum, Attorney
Post Office Box 1945
Austin, TX 78767

Jeremy Kahn, Attorney
Suite 733 Investment Building
1511 K Street, N.W.
Washington, DC 20005

Jeffrey Kohlman, Attorney
Suite 400
1447 Peachtree Street, N.E.
Atlanta, GA 30309